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IN THE

Supreme Court of the United States

October Term, 1960

No. 573

PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1960.

No. .....

HILLIARD DURFEE and OLEN DURFEE,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI.

Petitioners pray that a Writ of Certiorari issue to review the judgment of the Superior Court of the State of California in and for the County of Los Angeles, Appellate Department, entered in the above entitled case on July 11, 1960.

Jurisdiction.

The judgment sought to be reviewed is that of the Superior Court of the State of California in and for the County of Los Angeles, Appellate Department which was entered July 11, 1960, affirming the judgment of the Municipal Court of El Monte Judicial District, County of Los Angeles, State of California. The jurisdiction of this Court rests on 28 U. S. C. 1257(3). The Federal question, deprivation of property without due process of law, was raised at the

original trial level by counsel for Petitioners. Although a Los Angeles County Zoning Ordinance prohibits the use of any premises in any agricultural zone except as specifically set out by that statute, Petitioners asserted the defense of an existing "non-conforming use" to this zoning statute. Los Angeles County Zoning Ordinance 1494, Section 531, states:

> "An exception is granted automatically, hereby, so as to permit the continuation of the particular existing uses of any buildings, structures, or *premises* (emphasis ours) existing in the respective zones immediately prior to the time this ordinance, or any amendment thereof, becomes effective if such existing use was not in violation of this or any other ordinance or law."

At the trial level counsel for Petitioners was not permitted to place before the jury the outline of the "premises". Petitioners in an offer of proof [R. T. p. 23, line 14], stated that the use of the word "premises" by witness for Respondent was a conclusion, and offered to prove that these "premises" included a larger acreage which would have established the existing "non-conforming use". Petitioners were precluded from so doing. [R. T. p. 24, line 23.] Petitioners again requested the clarification of what was meant by the word "premises" [R. T. p. 23, line 12] and such clarification was denied. In response to the question by Petitioners of the witness for Respondents, "Did you see any hogs on the north side of Central?" (which acreage was part of the Durfee Ranch) an objection that "this would be immaterial and irrelevant" was sustained [R. T. p. 25, line

25], and the judge further decided the issue for the jury by stating, in the presence of the jury, "Counsel, we believe the question of whether or not there were hogs on some other premises owned by these people is immaterial," thereby incorrectly deciding the issue for the jury, *i.e.*, whether or not this acreage was part of the "premises".

Question Presented.

Where petitioners, who raised hogs on one part of their ranch at the time the zoning ordinance was passed were forced to move the same hogs to another portion of the same ranch, and where the Statute, Los Angeles County Zoning Ordinance No. 1494, controlling this use of property also set up a "non-conforming user" which would have acted as a complete defense to the zoning prohibition, were Petitioners deprived of their use of property without due process of law either (1) by the rulings and remarks of the trial judge or (2) did their non-conforming user not automatically continue to that new location on the same "premises" thus preserving their vested rights where their moving their hogs to a different location on those premises was not voluntary.

Statutes Involved.

The statutory provisions involved are Los Angeles County Zonjng Ordinance 1494, with amendments effective to January 1, 1959, Sections 232 and 531. They are printed in Appendix A, *infra*.

Statement.

The fact show that the Durfee family, Petitioners herein, owned an area of 124 acres when they took possession of the Durfee Ranch in approximately 1882, and that subsequently they sold certain parts of this property. All of the Durfee Ranch remaining was designated at a street number of 10943 East Fawcett, El Monte, California. This ranch has never been a scattered area, but was all part of the same whole. In 1958 seventeen acres of the ranch were sold to the Valle Linda School District for the construction of Valle Linda School after the beginning of condemnation proceedings against Petitioners. Later certain acreage was sold to a subdivider so that by the end of 1958 Petitioners retained only thirty-two acres. All thirty-two acres were part of a plot and there was no disconnected acreage. The hogs were originally housed on the acreage which was sold to Valle Linda School District. The facts further indicate that Petitioners *gave* an easement [R. T. p. 20, line 11] to a governmental body to construct a street named Central Avenue across the approximate middle of their ranch land and this was the only separation (if these surface rights are to be deemed to be a separation) between the Durfee Ranch acreage north and south of Central Avenue. At the time of the sale to the School District, Petitioners had six acres for hogs (approximately one hundred head of hogs were raised) and as this was a portion of the property to be used for the school, Petitioners were obliged to tear down the buildings and fences which housed their hogs and hence they moved these pens and these buildings and the same hogs to a different portion of the Durfee Ranch. It is uncontested that the pens did not exceed the size of

the pens which were torn down; that the buildings were no larger and that the same hogs were moved. It is true that the hogs had formerly been north of Central and after the move they were south of Central Avenue. As the "non conforming user" statute refers to the word "premises", as set out in Statutes involved, *infra*, granting an exception to permit continuation of existing uses to any "premises", it was vital that the outline of the Durfee Ranch be brought before the jury. Counsel for Petitioners was not permitted to place before the jury the outline of the "premises". Petitioners, in an offer of proof, [R. T. p. 23, line 14] offered to show that the use of the word "premises" by witness for Respondents, was a conclusion, and offered to prove that these "premises" included a larger area, (the thirty-two acres) and counsel was precluded from so doing [R. T. p. 24, line 23], despite the fact that Mr. Frakes, witness for Respondent, had testified that the Durfee Ranch consisted of six or seven acres. Petitioners again requested a clarification of what was meant by the word "premises" [R. T. p. 21, line 12] and such clarification was denied. In response to the question by Petitioners to the witness, Mr. Frakes, "Did you see any hogs on the north side of Central Avenue?" an objection that this would be "immaterial and irrelevant" was sustained [R. T. p. 25, line 25], and the trial judge further decided the issue for the jury by stating, in the presence of the jury, "Counsel, we believe the question of whether or not there were hogs on some other premises owned by these people is immaterial", thereby deciding incorrectly, the issue of whether or not this was all part of the "premises", *i.e.* Durfee Ranch. The question of whether or not these premises shall be considered *all* of the ranch owned by Petitioners

at the time of passing the Ordinance in 1952, or shall only be that specific six acres which was devoted to raising hogs, or shall be the portion of the ranch north of Central Avenue or that portion south of Central Avenue or any other combination of land is clearly a question of fact for the jury. Yet the trial Court commented upon this and said that the portion of the ranch north of Central Avenue was *not* a portion of the "premises". Petitioners argue that this statement of fact by the Court, and those statements of the Court set out above constitute reversible error. That this was not cured by a later cursory reading of the Code Section, No. 232, *infra.*

Reasons for Granting the Writ.

Since 1882 the Durfee Ranch has raised hogs. Petitioners were born on the ranch and when these Petitioners were small children, long before the zoning ordinance, the Durfee Ranch ran about one hundred head of hogs. Petitioners themselves acquired ownership of the ranch in 1926, long before the 1952 enactment of the zoning ordinance with which we are concerned. Their use was a legal use [R. T. p. 31, line 10]; it was actual [R. T. p. 37, line 13]; it has not expanded [R. T. p. 36, line 5]; it was the same kind of use [R. T. p. 36, line 5]; and has satisfied all of the elements of Los Angeles County Zoning Ordinance 1494, Section 531, so as to create a valid, non-conforming use.

I.

Where the Statute Creating the Existing "Non-Conforming User" Related It to the "Premises," Were Petitioners Deprived of Their Property Without Due Process of Law by the Rulings and Remarks of the Trial Judge in Refusing to Allow Introduction of Evidence as to What the "Premises" Consisted of?

It is an elementary principle of law that the trial court is not supposed to decide the issues of fact for the jury, as the following California cases illustrate.

Although there is a Constitutional privilege of comment by the trial Court on the evidence, the Court must keep in mind that the ultimate decision of the issues of fact must be fairly left to the jury.

People v. Nathan, 72 Cal. 2d 699, 165 P. 2d 481.

It is not proper for a trial Court to state in the presence of the jury that any material or important fact has been proved.

People v. Tomasovich, 56 Cal. 520, 206 Pac. 119.

The trial judge must not, during trial, directly or indirectly assume the guilt of accused, nor use language from which the jury can legitimately infer was his views are on the issues of fact submitted to them.

People v. Howland, 13 Cal. 303, 109 Pac. 894.

Petitioners argue that they had established a valid, non-conforming use of the "premises" in question and that this would have acted as a complete defense to this

action, but that they were precluded from bringing this before the jury because the trial judge had already decided the meaning of the word "premises" and had stated the "premises" did not relate to the acreage north of Central Avenue where the hogs were formerly housed. Petitioners, through their counsel, attempted to get a definition of the word "premises" as applied to this case, however the objection was made that the fact that "the hogs were being kept on another portion of the same ranch is deemed immaterial and irrelevant" and this objection was sustained by the Court. [R. T. p. 24, line 23.] The Court stated [R. T. p. 26, line 5] "Counsel, we believe the question of whether or not there were hogs *on some other premises owned by these people* (emphasis ours) is immaterial to this case now on trial. The objection will be sustained." The issue here is whether or not the transferred section of the Durfee Ranch and the remaining section of the Durfee Ranch all constituted the same *premises* so as to fall within the definition of the word "premises" in the Zoning Ordinance Section 531. Petitioners contend that when the Court decides the ultimate issue for the jury and tells counsel, in the presence of the jury, that this evidence related to "*some other premises* owned by the defendants", that the Court has already decided the ultimate issue for the jury, and that he cannot cure this by a subsequent submission to the jury of the issue of the definition of the word "premises". [R. T. p. 26.]

II.

Where Petitioners Had Raised Hogs on Their Ranch Since 1882, and Were Forced to Move Their Hogs to a Different Portion of That Same Ranch Because Condemnation Proceedings Had Been Started to Take Over the Portion Then Used for Housing Hogs; and Where the Statute, Enacted in 1952, Controlling This Use of Property, Also Set Up a "Non-Conforming User" Which Would Have Acted as a Complete Defense to the Zoning Prohibition, Did Their "Non-Conforming User" Not Automatically Continue on to the New Location on the Remaining "Premises," Thus Preserving Their Vested Rights, and Were They Not Deprived of the Use of Their Property Without Due Process of Law When This Use of the Remaining Property Was Curtailed?

The general rule is that a destruction, other than by voluntary use, does not constitute an abandonment by the owner of such non-conforming use, and the latter is entitled to replace the destroyed structures. For a construction of the statute, the actual issue does not appear to have arisen in California, hence we must look elsewhere for our interpretation.

In the case of *440 East 102nd Street Corp. v. Murdock* (1941), 285 N. Y. 298, 34 N. E. 2d 329, the Court held that the taking of a part of the premises by the City and the demolition of the buildings thereon did not terminate the non-conforming use as to the balance of the property. Where title to a portion of certain premises on which two buildings and a yard

were located was taken in condemnation proceedings, and the buildings demolished, it was held that the non-conforming use of the premises *to which the owner retained title* was not abandoned, although there had been the demolition of the buildings.

Similarly in the case of *Empire City Racing Association v. Yonkers* (1928), 132 Misc. 816, 230 N. Y. Supp. 457, the Court held that a destruction of buildings by fire does not constitute an abandonment of a non-conforming use. Where three barns belonging to a racing association which had been the owner of a race track for twenty-eight years were destroyed by fire, and where the association applied to the building inspector for a permit to erect two new barns and place them, not on the former location, but within the boundaries of the premises formerly used by the track, and where the property by a later zoning ordinance had been placed in a residential zone it was held that the owners were entitled to a *Writ of Mandate* (emphasis ours) to compel the issuance of the permits since the use of the premises as a race track had not been *voluntarily* abandoned.

Although there are no California cases in point, the California Legislature has set up certain methods of gradually eliminating the non-conforming use of property by obsolescence, abandonment, etc. Here this Court is asked to decide the issue of whether or not, after the beginning of condemnation proceedings (which were not concluded) taking a portion of Petitioners' ranch on which a valid non-conforming use existed, that non-conforming use extends to the remaining portions of the same ranch. Petitioners contend that to hold they

have no right to continue that use deprives them of their property without due process of law.

> "If before the zoning ordinance was adopted, the property was used for a lawful purpose which is prohibited by the zoning ordinance, the owner acquired a vested right to such use."
>
> *Dobbins v. City of Los Angeles,* 195 U. S. 223, 25 S. Ct. 18, 49 L. R. A. 2d 169.

> "No person shall be deprived of life, liberty or property without due process of law."
>
> United States Constitution, Fourteenth Amendment.

The Appellate Court relied heavily upon the principle of *Edmonds v. County of Los Angeles* (1953), 40 Cal. 2d 642, 255 P. 2d 772, to support the judgment.

In reviewing the *Edmonds* case, we find that in the *Edmonds* case plaintiff's business increased from the housing of twenty trailers to the housing of forty-eight trailers, despite the fact that they had permits and sanitary facilities for only twenty trailers. The Court determined that the Board of Supervisors gave to Appellants a three year exception, provided that they would abandon the entire non-conforming use at the end of that three year period. Additionally there was admittedly an increase in the burden on the property. Section 531 of the Statute states:

> "This section does not authorize the . . . expansion or enlargement of such existing use, or permits the addition of structures or other facilities in conjunction with such existing use."

Additionally petitioners contend the Court decided the issue on the basis of a binding agreement, as the Court

specifically stated "Plaintiffs made an oral promise on which defendants relied to their detriment, and justice can be done only by the enforcement of the promise. The situation presented is therefore the ordinary one of promissory estoppel."

Respondent relies heavily upon the case entitled, *City of Yuba City v. Cherniavsky*, 117 Cal. App. 568, however in this case the defendant maintained a grocery store on a portion of his lot and applied for and received a permit to build a dwelling house on a different portion of the same lot. He actually removed the merchandise from the grocery store and placed it in his home, and used his dwelling house as a store and abandoned the store, however, he had received no permit to use the home as a store and no permit to remove the store from its original location, and hence the Court was dealing with a different local ordinance which strictly requires the obtaining of a permit before moving. We will note that nowhere in the case does the Court say that aside from the problem of getting a permit was the moving from one part to another part of the same lot an abandonment of the user. The Court merely decided the issue on the basis of the failure to meet the requirements of a local ordinance.

Conclusion.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

HILLIARD DURFEE,

OLEN DURFEE,

In Propria Persona.

APPENDIX A.

Statutes of Los Angeles County Zoning Ordinance No. 1494, With Amendments Effective to January 1, 1959.

Section 232, *Prohibition.* A person shall not use any premises in any agricultural zone except as hereinafter specifically permitted in this article and subject to all regulations and conditions enumerated in this article.

Los Angeles County Zoning Ordinance 1494, with amendments effective to January 1, 1959.

Section 531, *Existing Uses.* An exception is granted automatically, hereby so as to permit the continuation of the particular existing uses of any building, structure, improvement or *premises* existing in the respective zones immediately prior to the time this ordinance or any amendment thereof becomes effective, if such existing use was not in violation of this or any other ordinance or law.

As used in this section, the word "property" refers only to that portion of the property actually utilized for the existing use. The word "improvement" does not include any improvement not a part of the existing use, and such improvement which is not a part of the existing use, shall be disregarded in the construction of this section.

This section does not authorize the extension, expansion, or enlargement of such existing use, or per-

mits the addition of structures or other facilities in conjunction with such existing use, except; (not applicable).

No person shall be deprived of life, liberty or property without due process of law.,

United States Constitution, Article XIV, Amendments.

APPENDIX B.

Opinions of Lower Court.

It Is Ordered and Adjudged that the judgment made and entered in the Municipal Court of the El Monte Judicial District, County of Los Angeles, State of California, in the above entitled cause be and the same is hereby affirmed.

Memo: Much of the evidence is only understandable by reference to a blackboard map that was before the trial court but is not before us.

Moreover, we find the principle of Edmonds v. County of Los Angeles (1953), 40 Cal. 2d 642, 652, to support the judgment.

By the Court.

Swain, *P. J.*

Huls, *J.*
Bishop, *J.*